TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER

vs.

NUNNALLY INVESTMENT COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 25, 1941
CERTIORARI GRANTED DECEMBER 22, 1941

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1

In Court of Claims of the United States

No. 42389

NUNNALLY INVESTMENT COMPANY

v.

THE UNITED STATES

I. Petition

Filed March 18, 1933

To the Honorable Judges of the Court of Claims of the United States:

The Petitioner, the Nunnally Investment Company, a corporation, respectfully shows to this Honorable Court and alleges:

1

At all times hereinafter mentioned the Petitioner was, and still is, a domestic corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at 86 Edgewood Avenue, Atlanta, Georgia.

2

This petition is filed to recover from the United States the sum of $200,000.00, with legal interest thereon, being the amount of income and excess profits taxes paid by Petitioner for the year 1920 in excess of the amount the Petitioner alleges was legally due, and which sum was wrongfully collected by the
2 Commissioner of Internal Revenue for the said year and paid by the Petitioner involuntarily and under duress and protest.

3

The Petitioner filed its income and excess profits tax return under the Revenue Act of 1918, 40 Stat. 1057, for the year 1920 and showed thereon no tax liability.

4

Thereafter, the Commissioner of Internal Revenue reviewed the Petitioner's return for 1920 and determined an alleged deficiency in the Petitioner's income and excess profits taxes for said year in the sum of $493,817.95. The computation upon which said determination was based was set forth in a state-

ment attached to a 60-day letter dated June 26, 1926, copy of which letter and statement are attached hereto, marked "Exhibit A."

5

Pursuant to the determination of the alleged tax liability set forth in the 60-day letter, referred to in the preceding paragraph, the Commissioner of Internal Revenue thereafter, to wit, on or about August —, 1926, assessed against the Petitioner income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon in the sum of $16,113.34, making a total amount of $509,931.29, which was demanded of Petitioner by the Collector of Internal Revenue for the District of Georgia on September 17, 1926.

6

The full amount of taxes and interest demanded of Petitioner, as described in the preceding paragraph, in the sum of $509,931.29, was collected from Petitioner by a cash payment of $509,931.29, made to said Collector on September 21, 1926, and by a credit of $14.37 allowed by the Commissioner on account of the overpayment of income taxes determined by the Commissioner to have been made against Petitioner for 1921.

7

In September 1929, the Commissioner of Internal Revenue refunded to Petitioner the sum of $250,000.00 out of, or with respect to, the payment of income and excess profits taxes and interest thereon for the year 1920, as described in paragraph 6 above.

8

Of the total payment of $509,931.29 made on September 21, 1926, as described in paragraph 6 above, the sum of $16,113.34, or 3.1599% of the total amount, represented interest on the income and excess profits taxes collected. Of the sum of $250,000.00 refunded to Petitioner in September 1929, as described in paragraph 7, the sum of $7,899.75, or 3.1599% of said refund, represented interest which had been collected on the income and profits taxes refunded, and the balance of $242,100.25 represented the refunded income and excess profits taxes for the year 1920.

9

The refund made in September 1929, as described in par-
4 agraphs 7 and 8 above, was based upon an adjustment of

the basis originally adopted by the Commissioner of Internal Revenue for the determination of an alleged gain on the sale of Petitioner's entire business and assets on January 2, 1920. The basis for the determination of the refund of income and profits taxes, described in paragraphs 7 and 8 above, is set forth in the schedule attached hereto marked "Exhibit B."

10

The unrefunded portion of the income and excess profits taxes collected from Petitioner, as described in paragraph 6 above, was excessive, illegal, and wrongfully collected by reason of the facts set forth in the following paragraphs.

11

On January 2, 1920, Petitioner sold its entire business and assets to The Nunnally Company of Delaware under a contract whereby the Purchaser paid $3,000,000.00 in cash and agreed to assume and pay all liabilities of Petitioner. Pursuant to this contract The Nunnally Company of Delaware paid additional income and excess profits taxes assessed against the Petitioner for the years 1917, 1918, and 1919. Among the tax payments so made by the Nunnally Company of Delaware on behalf of this Petitioner, $4,280.52 was paid on August 26, 1922, as additional income and excess profits taxes for the year 1919, and $35,458.98 was paid on May 16, 1921, as additional income and excess profits taxes for the years 1917 and 1918. The amounts of said taxes were in bona fide dispute until after the close of 1920; and as a practical matter it was impossible to determine, or even to estimate, the amount of these liabilities until after the end of 1920. The Commissioner of Internal Revenue has included these amounts in Petitioner's taxable income for the year 1920.

12

During the year 1920 Petitioner kept its books and reported its income on a cash receipts and disbursements basis and any taxes paid for Petitioner by the Purchaser under the contract of sale dated January 2, 1920, in the years 1921 and 1922, did not represent income to Petitioner in the year 1920. The Commissioner of Internal Revenue therefore has overstated Petitioner's income for the year 1920 in the sum of $39,739.50, by reason of including in said income the tax payments of $4,280.52 and $35,458.98, described in paragraph 11.

13

The Commissioner of Internal Revenue has understated Petitioner's invested capital before adjusting for inadmissibles for 1920 in the sum of $73,155.41 representing the prorated income and excess profits taxes of Petitioner for 1919 in the sum of $173,600.87, which tax was paid by The Nunnally Company of Delaware in 1920 and 1922 under a complete assumption agreement made by The Nunnally Company of Delaware with Petitioner on January 2, 1920, and therefore said tax was not paid out of Petitioner's surplus of January 1, 1920, and is not a proper deduction therefrom.

14

The Commissioner of Internal Revenue has understated
6 Petitioner's invested capital before adjustment for inadmissibles for 1920 in the sum of $35,458.98, representing income and profits taxes of Petitioner for the years 1917 and 1918, which were paid by The Nunnally Company of Delaware in 1921 under its complete assumption agreement of January 2, 1920. These taxes were never paid by Petitioner but by The Nunnally Company of Delaware, and were therefore never charged against Petitioner's surplus and do not constitute a proper deduction therefrom.

15

The facts hereinafter stated, and which were fully set forth in the claim for refund referred to in paragraph 26 below, and of which the Commissioner has proof in his files, so clearly bring Petitioner for the year 1920 within the provisions of Section 327 (a) and Section 327 (d) of the Revenue Act of 1918 and so clearly entitle Petitioner to have its profits taxes for the year 1920 computed by comparison with representative concerns, as provided in Section 328 of the Revenue Act of 1918, that the Commissioner had no discretion to refuse special assessment or to refuse to compute Petitioner's profits taxes for 1920 upon a comparison with fairly representative corporations and his failure to do so constitutes an utterly unwarranted and malicious and capricious abuse of the powers vested in him.

16

Prior to 1920 and since 1893, Petitioner had been engaged in the business of the manufacture and sale at wholesale and retail of confectionery. From 1885 to 1893 the same business had been conducted by an individual who was Petitioner's

predecessor in business. During the years from 1885 to 1919, inclusive, there had been built up for Petitioner a large goodwill in the manufacture and sale of confectionery, which goodwill was disposed of on January 2, 1920, for more than $2,000,000.00 in cash.

17

No part of the intangible values above referred to was included in Petitioner's invested capital for 1920, and no part of the expenditures for the building up of said goodwill was ever capitalized by Petitioner, and Petitioner's capital accounts included no goodwill or other intangible values.

18

At the end of 1919 and at the beginning of 1920 there was actually employed in the Petitioner's business goodwill and intangible values of approximately $2,000,000.00, which were not reflected in invested capital and these intangible values not reflected in invested capital were more than twice the tangible values reflected in invested capital, said tangible values reflected in invested capital amounting to less than $1,000,000.00, and said goodwill and intangible values were the principal income producing factor in Petitioner's business for 1920.

19

On January 2, 1920, Petitioner disposed of the goodwill and the intangible values in its business for more than $2,000,000.00 and realized a profit on same of approximately $1,100,000.00, being the excess over the March 1, 1913 value of same. This
8 $1,100,000.00 constituted substantially the entire income of Petitioner for 1920 and said profit on the sale of said goodwill and intangibles exceeded by approximately $500,000.00 the entire taxable net income of Petitioner for the year 1920, certain substantial losses having been realized after said sale on January 2, 1920.

20

The excess profits tax as finally determined by the Commissioner and as set forth in the computation attached hereto as "Exhibit B," works upon Petitioner an exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of special assessment and the tax computed by reference to representative corporations engaged in a like or similar trade or business as specified in Section 328 of the Revenue

Act of 1918. Said hardship results from said abnormal conditions, affecting Petitioner's capital and income for the year 1920, as above set forth.

21

Upon the computation of Petitioner's income and tax liability for 1920, as finally determined by the Commissioner and as set forth in Exhibit B attached hereto, Petitioner has paid excess profits taxes for the year 1920 equivalent to 35.95% of its net income, and Petitioner has paid total income and profits taxes for 1920 equivalent to 42.3% of its net income, and the proportions of tax to income will be substantially as high after corrections in said income and taxes are made in accordance with the adjustments shown below on account of certain adjustments in income which are required by the facts set forth in paragraphs 24 and 25 below.

22

9 Petitioner expended in advertising for 1909 to 1919, inclusive over $1,750,000.00 to which was due in large part the building up of the large goodwill disposed of by Petitioner in 1920, as above stated, for approximately $2,000,000.00 cash. All of said advertising expenditures were charged to expense and no part of said expenditures or the goodwill resulting therefrom was capitalized by Petitioner and it is now and was in 1920 impossible to determine what portion of said expenditures should properly have been capitalized, and for that reason it is and has at all times been impossible for the Commissioner of Internal Revenue to determine Petitioner's invested capital for 1920.

23

A comparison of the tax paid by Petitioner for 1920 in proportion to its income with the tax paid by representative corporations engaged in a similar trade or business in proportion to their income discloses that the Petitioner's ratio of profits tax to income was grossly higher than the ratio of representative corporations engaged in a similar trade or business as defined in Section 328.

24

On January 2, 1920, Petitioner sold its entire business and assets of The Nunnally Company of Delaware under a contract whereby the Purchaser paid $3,000,000.00 in cash and agreed to assume and pay all liabilities of Petitioner. Pursuant to this contract, The Nunnally Company of Delaware paid additional

10 income and excess profits taxes assessed against Petitioner for the years 1917, 1918 and 1919. Among the tax payments so made by The Nunnally Company of Delaware on behalf of Petitioner, $4,280.52 was paid on August 26, 1922, as additional income and excess profits taxes for the year 1919, and $35,458.98 was paid on May 16, 1921, as additional income and excess profits taxes for the years 1917 and 1918. The amounts of said taxes were in bona fide dispute until after the close of 1920 and as a practical matter it was impossible to determine or even to estimate the amount of these liabilities until after the end of 1920. These amounts have been included in taxable income for 1920 as finally adjusted by the Commissioner and as set forth in Exhibit B attached hereto.

25

During the year 1920 Petitioner kept its books and reported its income on a cash receipts and disbursements basis and any taxes paid for Petitioner by the purchaser under the contract of sale dated January 2, 1920, in the years 1921 and 1922 did not represent income to Petitioner in the year 1920. The Commissioner of Internal Revenue therefore has overstated Petitioner's income for the year 1920 in the sum of $39,739.50, by reason of including in said income the tax payments of $4,280.52 and $35,458.98, described in paragraph 24.

26

On September 12, 1930, Petitioner filed with the Collector of Internal Revenue at Atlanta, Georgia, a claim for refund setting forth the facts and reasons upon which this suit is based. Said claim for refund was rejected by the Commissioner of Internal Revenue on March 20, 1931.

27

11 Petitioner is, and has always been since its incorporation in 1893, a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

28

Petitioner is the sole and absolute owner of the claim herewith presented, and has made no transfer or assignment of said

claim, or any part thereof, and Petitioner is justly entitled to the amounts claimed herein from the United States after allowing all just credits and set offs.

Wherefore, Petitioner prays for judgment in its favor and against the United States of America for the sum of $200,000.00, with interest thereon from September 21, 1926, as provided by law, together with the costs and disbursements of this action, and for such other relief as may to this Honorable Court seem just and proper.

THE NUNNALLY INVESTMENT COMPANY,
By WINSHIP NUNNALLY,
Vice President.

WM. A. SUTHERLAND,
Attorney for Petitioner,
First National Bank Bldg., Atlanta, Georgia.

Of Counsel:
ANDERSON, CRENSHAW & HANSELL.
SUTHERLAND & TUTTLE.
JOSEPH B. BRENNAN.

12 [*Duly sworn to by Winship Nunnally; Jurat omitted in printing.*]

13 *Exhibit A, to petition*

WASHINGTON, D. C., *June 26, 1926.*

IT:CA:PYA 3-17-60D.
NUNNALLY INVESTMENT COMPANY,
Atlanta, Georgia.

SIRS: The determination of your income tax liability for the years 1920 and 1921, in connection with an examination of your books of account and records and the decision of this Bureau, as set forth in office letter dated September 17th, 1924, has been changed to disclose a deficiency for 1920 of $493,817.95 and an overassessment for 1921 of $14.37, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment
14 must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:PYA:3-17-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement.
Form A.
Form 882.

15 STATEMENT

IT:CA:PYA:3-17-60D.

IN RE NUNNALLY INVESTMENT COMPANY, ATLANTA, GEORGIA

Year 1920-1921; deficiency in tax $493,817.95; overassessment $14.37.

1920		
Net loss reported per books		$467,626.33
Add: Nontaxable income		56,386.82
Total		$524,013.15
Less:		
Interest on Securities Purchased	$8,646.06	
Profit on sale of assets	1,637,467.80	1,646,114.46
Net income adjusted		$1,122,101.31

Explanation of Adjustments

The nontaxable income and the interest on securities were fully explained in the Revenue Agent's report, dated May 7th, 1924. The profit on the sale of assets is as follows:

Consideration received		$3,209,958.91
Capital stock and surplus as of 12-31-19 adjusted in your brief	$1,072,491.11	
Goodwill allowed by Bureau	500,000.00	1,572,491.11
Profit adjusted		$1,637,467.80

16 **Invested Capital**

Invested capital reported in your brief		$1,072,491.11
Less:		
1919 tax prorated	$73,155.41	
1917-1918 Additional Tax	35,458.98	
Surplus adjusted	17,595.34	126,209.73
Balance		$946,281.38
Inadmissibles percentages .5561029		526,229.82
Invested capital		$420,051.56

Explanation

The adjustment for taxes is in accordance with Article 845 Regulation 45. The adjustment to surplus is fully explained in the Revenue Agent's report, dated May 7th, 1924.

Excess Profits Credit	$36,604.12
Excess Profits Tax Sec. 301	$424,717.64

Computation of Income Tax

Net Income	$1,122,101.31		
Less:			
Interest on U. S. Obligations not exempt	4,380.56		
Profits tax	424,717.64		
Exemption	2,000.00	$431,098.20	
Taxables at 10%		$691,003.11	
Amount of tax at 10%			$69,100.31
Total tax assessable			493,817.95
Previously assessed			none
Deficiency			$493,817.95

A goodwill valuation of $500,000.00 as of March 1, 1913, has been allowed in accordance with a recent decision of this Bureau.

17 1921

Net income per books		$178,104.35
Add: Interest on securities purchased		545.14
Total		$178,849.49
Less:		
Interest on securities purchased	$683.33	
Nontaxable interest	20,700.00	
Dividends received	103,519.50	124,902.83
Net income adjusted		$53,746.66

The above adjustment is fully explained in the Revenue Agent's report, dated May 7, 1924.

Computation of Tax

Net income	$53,746.66	
Amount of tax at 10%		5,374.67
Previously assessed		5,389.04
Overassessment		14.37

The overassessment shown herein will be made the subject of a certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

Payment of the tax should not be made until a bill is received for the Collector of Internal Revenue for your District, and remittance should be then made to him.

18 *Exhibit B to petition*

Computation of Income and Tax as Revised by Adjustment in Gain From the Sale of Business

	Gross Income	
Interest:		
On Corporation Bonds	$21,768.67	
Foreign Government Bonds	5,500.00	
Victory 4¾% Bonds	4,380.56	
Bank Deposits	5,624.35	
Loans	23,040.89	$60,314.47
Profit on Sale of Business as Finally Adjusted	1,111,162.91	
Total Taxable Gross Income		$1,171,477.38

EXPENSES AND LOSSES

Expenses		$87,486.05	
Interest Paid		6,159.59	
Losses:			
On Bonds Sold	$12,951.27		
Nunnally Stock Sold	549,084.05	562,035.32	
Total Deductions			575,680.96
Final Adjusted Taxable Net Income			$595,796.42

ADD

Non-taxable Income:			
Interest Received	$16,992.22		
Less: Paid	8,646.66	8,345.56	
Dividends		39,394.60	47,740.16
Total Net Income			$643,536.58

19 The Invested Capital as determined by the Department is $420,051.56. See T. D. letter dated June 26, 1926, IT: 1CA: PYA: 3-17-60D (Exhibit "A"). This was determined as follows:

Capital Stock and Surplus at December 31, 1919		$1,072,491.11
Less:		
1919 tax prorated	$73,155.41	
1917-18 Additional tax	35,458.98	
Surplus adjusted	17,595.34	126,209.73
Balance		$946,281.38
Deduct: Inadmissibles percentage .5561029		526,229.82
Adjusted Invested Capital		$420,051.56

A computation of the tax upon the foregoing taxable net income and invested capital is set forth below:

Taxable Net Income	$595,796.42
Invested Capital	420,051.56
Excess Profits Credit	36,604.12

	Income	Credit	Balance	Rate	Tax
20% of I. C.	$84,010.31	$36,604.12	$47,406.19	20%	$9,481.24
Balance	511,786.11		511,786.11	40%	204,714.44
	$595,796.42	$36,604.12	$559,192.30	35.95%	$214,195.68

INCOME TAX

Net Income		$595,796.42	
Less:			
Interest on U. S. Obligations	$4,380.56		
Profits Tax	214,195.68		
Exemption	2,000.00	220,576.24	
Balance taxable at 10%		$375,220.18	
Tax at 10%			$37,522.02
Adjusted total tax not refunded			$251,717.70
Total tax refunded September —, 1929			242,100.25
Total tax paid on September 21, 1926			$493,817.95

21 II. *General traverse*

Filed April 25, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

W. W. SCOTT,
Acting Head,
Court of Claims Division.

III. *Argument and submission of case*

On November 12, 1940, argument of case on merits begun by Mr. Wm. A. Sutherland for plaintiff, and by Mr. J. W. Hussey for defendant.

On November 13, 1940, argument of case on merits was concluded and submitted on merits by Mr. Wm. A. Sutherland for plaintiff, and by Mr. J. W. Hussey for defendant.

23 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J., & Dissenting opinion by Whitaker, J.*

Filed January 6, 1941

Mr. Wm. A. Sutherland for the plaintiff. Crenshaw, Hansell & Gunby, and Sutherland, Tuttle & Brennan, were on the briefs.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. Plaintiff is, and since its reorganization in 1935 has been, a domestic corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Wilmington, Delaware, and is engaged in the investment business. Plaintiff is the successor of Nunnally Investment Company, a corporation which at all times material hereto and until its reorganization into the plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Georgia and having its office and principal place

of business in the City of Atlanta, Georgia. Prior to January 2, 1920, the Georgia corporation was engaged in the candy business and related businesses under the name of "The Nunnally Company," and after January 2, 1920, it was engaged in the investment business under the name of "Nunnally Investment Company."

The word "plaintiff" when used in the following findings refers to the Georgia corporation.

24 2. On January 2, 1920, plantiff sold all its business and assets to the Nunnally Company of Delaware for $3,000,000.00 cash and the assumption of certain of plaintiff's liabilities, including all Federal taxes chargeable against the assets or business of the plaintiff for the years 1917, 1918, and 1919. The total consideration paid under this contract in consideration of the transfer of the business and assets was $3,209,958.91, which was paid as follows:

Cash to plaintiff, 1920	$3,000,000.00
Income and excess profits taxes for 1919 to the Collector of Internal Revenue, 1920	169,320.35
Additional 1917 and 1918 income and excess profits taxes to the Collector of Internal Revenue, 1920	899.06
Additional 1917 and 1918 income and excess profits taxes to the Collector of Internal Revenue, May 16, 1921	35,458.98
Additional 1919 income and excess profits taxes to the Collector of Internal Revenue, August 26, 1922	4,280.52
Total consideration	3,209,958.91

3. Plaintiff filed its tentative income and excess profits tax return for the year 1920 on March 15, 1921, and showed no tax liability to be due. In Schedule 22A of its final return, filed shortly thereafter, which also showed no taxes due, the profit from the sale of its assets on January 2, 1920, was reported as follows:

Sale of net assets		$3,000,000.00
Add: Federal taxes for year 1919 paid by The Nunnally Company		169,320.35
Total sale price		3,169,320.35
Book Value of Net Assets:		
Capital Stock	$100,000.00	
Profit and Loss Surplus	1,015,174.27	
	1,115,174.27	
Fair Value of Capital Assets at March 1st, 1913, in excess of Book Value at that date after considering Depreciation to January 1st, 1920 (Per Schedule Attached)	157,225.00	1,272,399.27
Sales price of goodwill		1,896,921.08

25	Value of Goodwill at March 1st, 1913: The business was established in 1885, and at January 1st, 1920, had been conducted 35 years, of which 28 years were prior to March 1st, 1913. Therefore, the value of Goodwill at March 1st, 1913, is 28/35 or 4/5 of the Sales Price—4/5 of $1,896,921.08	$1,517,536.86
	Net profit from sale of assets	379,384.22

4. Thereafter the Commissioner of Internal Revenue reviewed the plaintiff's return for 1920 and determined a deficiency in plaintiff's income and excess-profits taxes for 1920 in the sum of $493,817.95. The computation upon which said determination was based was set forth in a 60-day letter dated June 26, 1926, which statement is printed as Exhibit A to the petition in this case, and made a part hereof by reference.

5. Pursuant to the determination of the tax liability set forth in the 60-day letter of June 26, 1926, the Commissioner of Internal Revenue in August of 1926 assessed against plaintiff, income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon of $16,113.34, making a total amount of $509,931.29, which was demanded of plaintiff by the Collector of Internal Revenue for the District of Georgia on September 17, 1926, and was paid to the Collector on September 21, 1926.

6. On April 22, 1927, the plaintiff filed with the Collector of Internal Revenue at Atlanta, Georgia, a claim for refund of the full amount of taxes and interest paid as set forth in finding 5 above, alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold on January 2, 1920. No other ground for refund was stated in the claim.

7. More than six months having elapsed after the filing of said claim, the plaintiff filed a suit against the Collector of Internal Revenue in the United States District Court for the Northern District of Georgia, denying generally any of the taxes assessed against it by the Commissioner of Internal Revenue as
26 set forth in finding 5 above were due and raising no issue except the basis for tax purposes in the hands of the plaintiff of the assets sold on January 2, 1920.

8. The Collector filed an answer, denying the facts set forth as to the proper basis of the assets sold on January 2, 1920, or that the tax was illegal, but introducing no new issue by way of defense; and the case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold.

9. The jury rendered no general verdict and rendered the following special verdict:

"1. What was the fair market value on March 1, 1913, of the entire business and property of the Nunnally Company? One Million Six Hundred Thousand Dollars ($1,600,000).

"2. Did the leases then owned by them have a market value? Yes.

"3. If so, what was their aggregate value? ($11,000) Eleven Thousand Dollars."

10. Following the rendition of the verdict, the Collector filed a motion for a new trial based on the ground that the verdict was not supported by the evidence and was based upon some evidence which was alleged to have been improperly admitted.

11. The Court, following the rendition of the verdict, called on the parties for a computation of the judgment to be based on the verdict, and in pursuance of this order the Collector filed a computation employing the invested capital figures used in the 60-day letter of June 26, 1926, referred to and cited in finding 4, and employing the same income figures there used except that profit from the sale of assets was computed as follows:

Sale price of property sold 1/2/20		$3,209,958.91
Basis of property sold:		
Goodwill	$964,000.00	
Tangibles	1,072,491.11	
Leaseholds (depreciated in full)		
		2,036,491.11
Net Profit from sale		1,173,467.80

27 On the basis of this computation the Collector showed the following results:

Total tax		$280,377.95
Tax collected by defendant		493,817.95
Refund of tax		213,440.00
Refund of interest = $\frac{\$213,440.00}{\$493,817.95} \times \$16,113.34$		6,964.50
Overpayment of tax and interest		220,404.50

12. Plaintiff, prior to the filing of the Collector's computation referred to in the preceding finding, had filed a computation in which it had employed an adjusted invested capital figure of $452,655.57, instead of the figure of $420,051.56 employed in the 60-day letter of June 26, 1926, and in the Collector's computation referred to in the preceding finding, and in which it had shown the profit on the sale of assets as follows:

Sale price 1/2/20	$3,209,958.91
Basis of property sold	2,308,044.76
Net profit on sale	901,914.15

On the basis of these figures the plaintiff showed the following tax results:

Corrected tax	$153,820.03
Amount of tax paid	493,817.95
Overpayment of tax	339,997.92
Interest on overpayment	11,094.17
Overpayment of tax and interest	351,092.09

13. After having examined the Collectors computation, the plaintiff filed a computation, which was identical with the Collector's computation referred to in finding 11, as to invested capital and in all other respects except that the income arising from the sale on January 2, 1920, was computed on exactly the same basis set forth in the preceding finding, and the
28 plaintiff showed in this computation that the only difference between its final computation and the Collector's computation was as follows:

	Government	Nunnally
Goodwill 3/1/13	$964,000.00	$964,000.00
Tangibles 3/1/13	625,000.00	625,000.00
Increase in value of tangibles between 3/1/13 and 1/2/20	447,491.11	719,044.76
	2,036,491.11	2,308,044.76
Sale Price	3,209,958.91	3,209,958.91
Cost of property as of 1/2/20	2,036,491.11	2,308,044.76
	1,173,467.80	901,914.15
Difference in Profit	271,553.65	

On the basis of this computation the plaintiff showed the following tax results:

Corrected tax	$155,463.27
Amount of tax paid	493,817.95
Overpayment of tax	338,354.68
Interest on overpayment	11,040.55
Overpayment of tax and interest	349,395.23

14. In the light of the dispute between the parties, as to the proper valuation, on the basis of the verdict, of the assets sold on January 2, 1920, and in the light of the defendant's motion for a new trial, the parties on June 27, 1929, entered into the following stipulation for judgment and no appeal:

"Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and

Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.

"Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.

29 "It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into."

This stipulation for judgment represents the only agreement between the parties relating to the disposition of the suit. No actual computation of the tax and interest resulting in this exact figure of $250,000, for which judgment was entered, and no computation showing the division between tax and interest was made by either party at or before the conclusion of the District Court suit.

15. On the basis of said stipulation for judgment, judgment was entered on July 6, 1929, for $250,000 and lawful interest from September 21, 1926, and costs of suit, and a certificate of probable cause was granted.

16. In pursuance of said judgment, a certificate of overassessment was issued to the plaintiff for the $250,000 and interest thereon from September 21, 1926, to September 27, 1929, in the sum of $45,246.58 and costs of $18.75, and this total of $295,265.33 was paid to the plaintiff on or about September 29, 1929.

17. On September 13, 1930, the plaintiff filed with the Collector of Internal Revenue at Atlanta a claim for refund of $200,000 income and profits taxes for 1920. This claim used as the basis on January 2, 1920, of the property then sold the sum of $2,098,796, which figure the claim alleged, if used in conjunction with the other figures in the 60-day letter of June 26, 1926, which were undisputed in the District Court suit, would show the amount of refund for which judgment was rendered in the District Court. The claim was based upon the alleged right to special assessment and other grounds which have now been abandoned, and also upon the ground upon which this suit is now based, namely, that additional income and excess profits taxes paid in 1921 and 1922 by the purchaser, in accordance with the terms of the agreement covering the sale on January 2, 1920, did not constitute income

of the plaintiff in 1920 but only in the years in which the payments were made.

30 18. The claim for refund was rejected on Schedule dated March 20, 1931, and the present suit was filed on March 18, 1933. On May 9, 1939, the portions of the petition claiming special assessment and certain minor adjustments in invested capital, paragraphs 11 to 23, inclusive, were stricken, leaving involved in the suit only the claim that additional income and profits taxes paid by plaintiff's purchaser in 1921 and 1922 for the years 1917, 1918, and 1919 did not constitute taxable income of plaintiff for the year 1920.

19. The additional taxes for 1917 and 1918 in the amount of $35,458.98 and for 1919 in the amount of $4,280.52 were in dispute until after the year 1920 and the liability therefor was not determined until 1921 and 1922, the years in which these additional taxes were paid.

20. The records of the plaintiff were kept on a cash receipts and disbursements basis, and its returns, including that for 1920, were made on that basis.

21. All the underlying figures as to income and invested capital set forth in the 60-day letter of June 26, 1926, are correct with the exception of the figure $3,209,958.91 shown as the consideration received, and the figure of $1,572,491.11 shown as the basis at January 2, 1920, of the property then sold. The facts as to these excepted figures are set forth in Findings 22 and 23, infra.

22. The basis for tax purposes at January 2, 1920, of the property then sold was $2,098,796, and not $1,572,491.11 as shown in the 60-day letter of June 26, 1926.

23. The figure of $3,209,958.91 shown as the consideration received in 1920 from the sale of the assets sold on January 2, 1920, which figure was used in all the computations of the collector and the plaintiff in the proceeding in the United States District Court for the Northern District of Georgia, above referred to, is correct if the taxes of $39,739.50 paid in 1921 and 1922 for 1917, 1918, and 1919, as shown in Finding 19, are properly included in income for 1920. If such sums are not properly to be included in income for 1920, the figure of $3,209,958.91 is overstated by the amount of such improper inclusion.

31 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover.

Judgment will be withheld pending the filing, within ten days from the date of the rendition of this opinion, of a calculation of the amount of plaintiff's recovery on the part of the plaintiff, and a memorandum in relation thereto on the part of the defendant, in the manner stated in the opinion.

Opinion

GREEN, Judge, delivered the opinion of the court:

This is an action to recover the amount of $18,857.82 alleged to have been overpaid as income and profits taxes for the year 1920, together with interest thereon of $577.65.

On January 2, 1920, plaintiff sold all its business and assets. Part of the consideration of the sale was the assumption of certain taxes by the purchaser, which were paid in the years 1921 and 1922. The amount of these taxes was included by the Commissioner as part of plaintiff's income for the year 1920, and the Commissioner in August 1926, accordingly assessed against plaintiff income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon of $16,113.34, making a total amount of $509,931.29, which was demanded of plaintiff by the U. S. Collector of Internal Revenue and paid to the collector September 21, 1926.

The plaintiff duly filed a refund claim for the whole amount of taxes and interest paid, alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold on January 2, 1920. No other ground for refund was stated in the claim. More than six months later the plaintiff filed suit against the Collector of Internal Revenue on the same grounds that were stated in the claim. The case was tried by a jury which rendered a special verdict and a stipulation was entered into between the parties that judgment should be entered in favor of the plaintiff for $250,000,
32 with interest and cost, which was accordingly done on July 6, 1929. Pursuant to this judgment a certificate of probable cause was granted and thereafter a certificate of overassessment was issued to the plaintiff in accordance with the judgment, and the total amount due thereon was paid to the plaintiff by defendant about September 29, 1929.

On September 13, 1930, the plaintiff filed with the Collector of Internal Revenue of Atlanta a claim for refund of $200,000. income and profits taxes for 1920. The claim was based on the alleged right to special assessment, and other grounds which have now been abandoned, and also upon the ground on which this suit is now based, namely, that additional income and excess-profits taxes paid in 1921 and 1922 by the purchaser in accord-

ance with the terms of the agreement of sale of January 2, 1920, did not constitute income of the plaintiff for 1920 but only in the years for which the payments were made. This claim for refund having been rejected suit was begun thereon on March 18, 1933. Thereafter certain portions of the petition were stricken leaving only the claim that additional income and profits taxes paid by plaintiff's purchaser in 1921 and 1922 did not constitute taxable income to plaintiff for the year 1920, the records and returns being kept on a cash receipts and disbursements basis.

Two questions are presented by the case. (1) Whether taxes for prior years assumed by the purchaser of plaintiff in 1920 were income to plaintiff in 1920, although the taxes were not actually paid in that year and (2) Whether plaintiff is precluded from recovery in this action of any refund of 1920 taxes by reason of the judgment obtained against the United States Collector of Internal Revenue for the District of Georgia.

We think it is clear that the fact that plaintiff was on a cash basis makes the 1921 and 1922 payments not income in 1920. See W. A. Hoult v. Commissioner, 23 B. T. A. 804; A. W. Henn v. Commissioner, 20 B. T. A. 1133; and Charles C. Ruprecht v. Commissioner, 16 B. T. A. 919.

The question of whether plaintiff's recovery is barred by reason of the judgment which it obtained against the defend-
33 ant in the suit against the collector presents a much more difficult problem. The plaintiff insists that an unbroken line of decisions by the Supreme Court lay down the rule that a judgment against a collector for taxes illegally collected is personal, and does not prevent the taxpayer from bringing a later suit against the United States involving errors alleged to exist in the computation of taxes for the same years. Sage v. United States, 250 U. S. 33, is cited as the leading case promulgating this doctrine. In this case, like the one at bar, the taxpayer had sued the collector on the ground that the taxes had been illegally collected, and recovered judgment which was paid by the United States. A suit was later begun for a residue of the same taxes. In defense it was pleaded that the suit was barred by a former judgment. The court referred to the fact that it was the duty of the District Attorney to appear for the collector in such suits under the statutes; that the judgment is to be paid by the United States, and the collector is exempted from execution if a certificate is granted by the court that there was probable cause for his act. The court further said:

"* * * But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it

would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in Minnesota v. Hitchcock, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. United States v. Frerichs, 124 U. S. 315. But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the Act of July 27, 1912, c. 256, 37 Stat. 240, upon which, as well as the Act of 1902, this claim is based."

Counsel for the defendant call attention to the last sentence of the part of the opinion quoted above, and argue that it shows that the case was in fact decided upon a different ground from that which was first stated, and that all that is contained in the opinion with reference to the bar of a former judgment is merely dictum.

The principal contention of the defendant is, however, that the Sage case, supra, has been overruled by the opinion in the case of Moore Ice Cream Co. v. Rose, 289 U. S. 373, 381, 382, 383, in which the Supreme Court, with reference to a suit against a collector, said:

"His duty being imperative, he is protected by the command of his superior from liability for trespass * * *, and is entitled as of right, to a certificate converting the suit against him into one against the Government."

And also that—

"A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay.

* * * * * *

"In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

The court further said with reference to the collector:

"Execution can never issue against him upon any judgment recovered in favor of the taxpayer."

But in Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 312, decided during the same term, but at a prior date, it was held that a judgment against a collector was not res judicata against the Commissioner or the United States, citing Graham & Foster v. Goodcell, 282 U. S. 409, 430, and Sage v. United States, 250 U. S. 33.

35 So also in Tait v. Western Maryland Railway Co., 289 U. S. 620, 627, the Supreme Court said:

"In a suit for unlawful exaction the liability of a collector is not official but personal." Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham & Foster v. Goodcell, 282 U. S. 409, 430. "And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States." Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311.

And in the case of Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 402, 403, the court said:

"A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. Cromwell v. County of Sac, 94 U. S. 351. There is a privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the Government. See Tait v. Western Maryland Railway Co., 289 U. S. 620. * * * Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (Sage v. United States, 250 U. S. 33; Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.'" Sage v. United States, supra, p. 37.

The defendant contends that although the parties in the case at bar are not the same as those in the suit against the collector, the United States is privy to the case against the collector under the rules laid down in the Moore Ice Cream Co. case, supra, and that even if the doctrine of res judicata does not in a strict sense apply the plaintiff is nonetheless estopped by its judgment obtained against the collector. In support of this contention counsel for defendant cites the case of United States v. California Bridge & Construction Co., 245 U. S. 337, 341, in which the court said:

"The doctrine of estoppel by judgment, or res judicata, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or
36 with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. * * *"

This same rule is applied by the Court of Civil Appeals of Texas in the case of Cauble v. Cauble, 2 S. W. (2d) 967, which notes a distinction between res judicata and estoppel by judgment.

In further support of this contention defendant quotes from Paul's Selected Studies in Federal Taxation (2d Ed.), pp. 124, 126, in which in commenting on the Western Maryland Railway Co. case and Bankers Pocahontas Coal Co. case the view is set forth that the real party in interest in these suits against a collector is always the United States, and that the decision of Justice Holmes in the Sage case, supra, that a suit against a collector is purely personal in nature must be considered as having been rendered inapplicable by the decision in the Moore Ice Cream Co. case.

The defendant further calls attention to an article in 46 Yale Law Journal, 1320 (1937), in which the author says (pp. 1342, 1343), in substance, that in the Moore Ice Cream Co. case the Supreme Court specifically held that where the collector acted pursuant to an assessment, the United States becomes a party to the judgment as a matter of law, and further that the decision in the Sage case should no longer be followed.

Attention is also called to that part of the opinion in the Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, which holds that identity of the parties is not a matter of form but of substance and that "a judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them."

It might further be said that there can also be found in the decisions of the State courts many cases which hold that a litigant should be allowed but one opportunity to try his case on the merits in the interests of the public, and that on grounds of public policy, the principle of estoppel should be expanded so as to embrace within the estoppel of a judgment persons
37 who are not, strictly speaking, either parties to the suit.

Also it would seem that as the collector under the decision in the Moore Ice Cream Co. case was the duly authorized agent of the Government the question would arise whether the

judgment in a case against him would be binding against the United States and render the matter of litigation res judicata.

All the matters presented for our consideration by the defendant would have much force and perhaps be sufficient to warrant a decision in its favor if it were not for the positive decisions of the Supreme Court to the contrary. We cannot treat the language used by Justice Holmes in the Sage case, supra, as merely dictum when there are three recent cases which cite the case as an authority that a judgment against a collector is not res judicata against the Commissioner or the United States. For the same reason we think that it cannot be held that the Moore Ice Cream Co. case overrules the Sage case or the Bankers Pocahontas Coal Co. case, neither of which are mentioned in the first named decision.

As we have already shown the Supreme Court in the Tait case, supra, decided three weeks subsequent to the decision in the Moore Ice Cream Co. case again confirms the rule laid down in the Bankers Pocahontas Coal Co. case, and finally in the very recent decision of the Sunshine Anthracite Coal Co. case, supra, refers to the decision in the Sage case and the Bankers Pocahontas Coal Co. case as recognized authorities.

Without discussing the legal principles involved in the case now before us, we are of the opinion that the repeated holdings of the Supreme Court sustaining the Sage case and ignoring the Moore Ice Cream Co. case make it proper in the instant case to apply the doctrine of stare decisis and feel constrained to hold plaintiff's action is not barred by the judgment against the collector. This conclusion makes it unnecessary to consider the other questions raised in the case.

The findings show that plaintiff's purchaser agreed to pay taxes for 1917, 1918, and 1919 due from the plaintiff in the sum of $39,739.50. Although this amount was not paid until 1921
38 and 1922, it was erroneously included in the gross income of plaintiff for 1920 and plaintiff's taxes computed accordingly. The plaintiff is entitled to recover the amount its taxes for 1920 were increased by this error, together with interest as provided by law. But neither party has submitted a calculation of the amount of plaintiff's recovery, if entitled to judgment. The defendant presents a claim that plaintiff's recovery cannot be properly calculated as a reason for not entering judgment in its favor. With this we do not agree. On the contrary we think it can be done. Each party is granted ten days in which to file a typewritten statement, which on the part of the plaintiff shall contain a calculation of the amount due in accordance with this judgment, and on the part of the defendant a memorandum con-

taining such further observations as its counsel may see fit to present with reference to the amount of plaintiff's recovery, and the papers so filed will be considered by the court in entering judgment.

LITTLETON, Judge; and WHALEY, Chief Justice, concur.

Dissenting opinion

WHITAKER, Judge, dissenting:

It is axiomatic that a former judgment is res judicata in a second suit on the same cause of action, not only as to those who were parties to the former action, but also as to their privies. The cause of action in the present suit is the same as in the former one and the plaintiff is the same; but in the former one the Collector of Internal Revenue of the United States was the defendant, whereas in this suit it is the United States that is the defendant, and not its collector. The question presented, therefore, is whether or not under the circumstances of this case the United States in the former action was a privy of its collector.

Section 12 of the Act of March 3, 1863 (12 Stat. 737, 741) provides that in suits against collectors to recover taxes "no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury" in these two cases, (1) where the court shall have certified "that there was probable cause for the act done by the collector
39 or other officer" or (2) where "he acted under the directions of the Secretary of the Treasury or other proper officer of the government."

In this case it appears from our findings of fact that in collecting the tax from this plaintiff the collector acted in pursuance of the second condition, that is, under an assessment made by the Commissioner of Internal Revenue. Under such circumstances the judge had no discretion as to whether or not the necessary certificate should be issued. The collector was entitled to it as of right. Had the collector acted on his own motion, without an assessment or other direction from his superiors, the certificate would have issued or not according to whether or not the judge believed that he had acted with probable cause; but not so where the collector acted in pursuance of instructions. Here the judge had no discretion. Upon it appearing that the collector acted under instructions, he was compelled to issue the certificate. Therefore, in this case, under the statute, no execution could possibly issue against the collector; but, of necessity, the judgment had to "be provided for and paid out of the proper appropriation from the treasury."

Under such circumstances, the United States knew when suit was brought against the collector that it would have to respond to any judgment rendered. When the suit was instituted it was, therefore, put on guard to defend its interest. This it in fact did in the former proceeding in this case. Its United States Attorney appeared and defended the action; he defended, not to save the collector from an execution, but to save the United States from responsibility for the judgment.

In that suit the United States had an opportunity to interpose every defense it could have, interposed had the suit been against it in name, instead of against it in substance; and the plaintiff had the right to advance every ground for recovery that it could have advanced had the United States been the nominal defendant. Every reason for the rule of res judicata is, therefore, present in this case. The reason a former judgment binds not only the same parties, but also their privies, is that a person in privity with a party to the action is under the obligation, because of his interest in the outcome of the litigation, to see to it that all defenses are raised in that suit to defeat it. He is under this obligation because the burden of the judgment may fall on him, in whole or in part. Therefore, having once had the opportunity to defend, he is denied it if later a suit is brought against him in person.

I have no doubt that the former judgment in this case is res judicata. My only concern is whether or not this view is in harmony with prior decisions of the Supreme Court. I think it is, if those decisions can be properly limited to cases where the United States might not have to pay the judgment and liability therefor might fall on the collector personally. I think they can be.

In the following discussion of the cases in the Supreme Court it is necessary to keep in mind that there are two contingencies under which a judgment against a collector must be satisfied by the United States; one is in a case where the judge shall issue a certificate that "there was probable cause for the act done by the collector or other officer"; and the other is "that he acted under the directions of the Secretary of the Treasury or other proper officer of the government." My view is that former decisions of the Supreme Court holding that a judgment against the collector is not res judicata in a later suit against the United States should be limited to cases where the judge must exercise his discretion as to whether or not to issue a certificate of probable cause, and do not apply to a case where the collector acted under directions of his superior, in which case the certificate must issue of necessity.

The leading case is Sage v. United States, 250 U. S. 33. In this case the court held that a judgment against the collector was not res judicata in a later proceeding against the United States.

This was on the theory that the suit against the collector was a personal one, for a wrong committed by him personally in exacting taxes which the taxpayer did not owe. Since it was a personal action, for which he might have to respond personally without the right of idemnification by the United States, the court held that a judgment against him was not res judicata in a later suit against the United States, which might not
41 have been involved by the former judgment. But it did not appear in that case whether or not the collector in collecting the taxes had acted on his own motion or under directions of the Secretary of the Treasury. Apparently the decision was grounded upon the fact that the certificate might or might not have been granted within the discretion of the trial judge, and that, therefore, until such a certificate should issue, the United States did not know whether or not it would become liable for the judgment. Since it could not know this until after the judgment was rendered, the court held it was a stranger to the judgment at the time it was rendered, and for this reason the judgment would not bind it in a later action. At the bottom of page 37 the court said:

"At the time judgment is entered the United States is a stranger. Subsequently the *discretionary* action of officials may, *or it may not*, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself." [Italics supplied.]

So far as appears, the court's attention was not directed to the difference between a case for the issuance of a certificate of probable cause and a case where the collector was performing merely a ministerial duty in collecting an assessment made by his superiors, in which case a certificate must issue as a matter of course. In the former the United States might or might not become liable for the judgment; in the latter it could not but be.

In the case of Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, which followed the decision in the Sage case, supra, it did not appear whether or not the collector had acted in pursuance of an assessment or on his own motion, nor is there anything in this case, also, to indicate that the court's attention had been directed to the distinction between a suit against a collector acting under directions from his superior officers and one in which he had acted on his own motion. It was merely stated without discussion that a judgment against a collector was not "res judicata against the Commissioner or the United States."

42 The first case in which this distinction seems to have come to the attention of the court is Moore Ice Cream Company, Inc., v. Rose, Collector of Internal Revenue, 289 U. S. 373. In view of what was held in that case it seems to me that

had this distinction come to the attention of the court in the Sage case and in the Bankers Pocahontas Coal Company case, these decisions would have been limited to instances where the collector had acted without instructions from his superior.

This distinction between the relation of the United States to a suit against the collector where he had acted under directions of his superior officer, and its relation to one where he had acted on his own motion was carefully developed by the court in this case. It did not deal with the question of whether or not a judgment against a collector would be res judicata in a later suit against the United States, but it seems to me that it necessarily follows from its decision that it would be in a case where he had acted under directions of his superior.

The Moore case involved the necessity for protest as a prerequisite to a suit to recover taxes erroneously exacted. The argument in support of the necessity for protest was that while the statute might eliminate the necessity for it in a suit against the government, it could not constitutionally do so in a suit against the collector, as to taxes paid prior to the passage of the Act, since the collector was under a personal obligation to pay any judgment recovered against him. The court, discussing this personal liability, and after calling attention to the fact that there were two different conditions upon which the government agreed to indemnify the collector, proceeded to discuss at length the difference between the relation of the collector and of the United States in a suit in which the collector had acted under the directions of the Secretary of the Treasury or other proper officer of the government, and in a suit where he had acted on his own motion. Dealing with a case where he had acted under instructions, the court said:

> There was nothing left to his discretion. Other duties less definitely prescribed may leave a margin for judgment and
> 43 for individual initiative. Cf. Agnes v. Haymes, 141 Fed. 631. There was no such margin here. His duty being imperative, *he is protected by the command of his superior from liability for trespass* [citing cases], and is entitled *as of right to a certificate converting the suit against him into one against the Government.* * * * The case is not one for a certificate of probable cause, as it might be if the officer had trespassed under a mistaken sense of duty. In such circumstances a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. [Citing cases.] One does not speak of probable cause when justification is complete. Here the certifying judge will be subject to a specific duty upon the facts admit-

ted by the demurrer to relieve the Collector of personal liability and to shift the burden to the Treasury.

* * * * * *

"A suit against a Collector who has collected a tax in the fulfilment of *a ministerial duty* is today an anomalous relic of bygone modes of thought. *He is not suable as a trespasser, nor is he to pay out of his own purse.* He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. Philadelphia v. Collector [5 Wall. 731]. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. [Citing cases.] They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court." [Italics supplied.]

Since in such a case the collector was not personally liable for trespass (the basis for the decision of the court in the Sage and Bankers Coal Company cases) and could not be subjected to personal liability in any event, the court held that to deprive him of the necessity for protest against the exaction of a tax, paid prior to the enactment of the statute, did not deny him due process.

But the court was careful to limit its opinion to a case where the collector was acting under the directions of his superior officer, and expressly differentiated such a case from one where the issuance of a certificate by the court was "dependent upon controverted facts, or upon facts permitting different inferences or calling upon the judge to exercise discretion." This was for the reason that in the latter case the United States might never become liable for the judgment, whereas in the former its liability was definite and certain.

In view of this decision, I think the decision in the Sage case and in the Bankers Pocahontas Coal Company case must be limited to instances where the collector has not acted under directions of his superior. Where he has so acted, he has committed no personal trespass and can in no event be made to pay the judgment rendered; the liability therefor always falls upon the United States. The liability under the judgment being inescapable, responsibility is on the United States to offer all of its defenses in that suit. Having thus had its day in court, it cannot later bring a suit on the same cause of action. Conversely, the plaintiff, having once had the opportunity to present its claim

in full against the United States, although the collector was the nominal defendant, it cannot do so again in a later action. It may be otherwise where the collector has acted on his own motion and not under instructions, but not in a case where the liability for the judgment must of necessity fall on the United States.

I do not think the decision in Tait v. Western Maryland Ry. Co., 289 U. S. 620, is contrary to this view. On the contrary, it is some support for it. There the court said:

"If a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham & Foster v. Goodcell, 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311. We think, however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." See Second National Bank of Saginaw v. Woodworth, 54 F. (2d) 672; Bertelsen v. White, 58 F. (2d) 792.

45 While, the court stated, a judgment in a personal action against the collector is not res judicata in a later suit against the Commissioner or the United States, still, it said, a former judgment against the United States or the Commissioner would estop the collector in a later suit, because of the privity between him and the United States and its Commissioner. If this be true, how can it be doubted that a judgment against the collector for an act done by him at the direction of the Commissioner would be an estoppel against the Commissioner or the United States in a later suit? And a judgment cannot be an estoppel against one party to a suit and not against the other. Where the collector acts under the Commissioner's direction, and not on his own motion, his act is the act of the Commissioner, and a judgment against him for this act must of necessity bind the Commissioner. Under this decision, it would be otherwise if he acted on his own motion. I know of no other theory on which the quoted statements from this case can be harmonized.

There is nothing in the decision in Sunshine Coal Co. v. Atkins, 310 U. S. 381, which is contrary to this view. This case merely states again, incidentally, the proposition laid down in the Sage case, that the suit against the collector is personal, and for this reason a judgment in such a suit is not a bar to a subsequent suit against the United States. I think this expression,

as the similar expression in the Sage case, must be limited to those cases where the collector might be personally liable for the payment of the judgment.

For the reasons stated, I think plaintiff's petition should be dismissed.

47 V. *Order of court entering judgment*

Jan. 27, 1941

Now on this 27th day of January 1941, the court, having considered the memorandums of the respective parties with reference to the amount of judgment to be entered herein, finds that the plaintiff is entitled to a refund of $18,280.17 taxes paid and $596.48 interest paid on September 21, 1926.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the total sum of eighteen thousand eight hundred seventy-six dollars and sixty-five cents ($18,876.65) heretofore paid, with interest at the rate of six percent per annum from September 21, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

By the Court,

RICHARD S. WHALEY,
Chief Justice.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 45339. Court of Claims. Term No. 990. The United States, Petitioner vs. Nunnally Investment Company. Petition for a writ of certiorari and exhibit thereto. Filed April 25, 1941. Term No. 990 O. T. 1940.

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Supreme Court of the United States

No. 990, October Term, 1940

Order granting petition for rehearing and certiorari

December 22, 1941

On petition for writ of certiorari to the Court of Claims.

A petition for rehearing having been filed in this case on the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

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